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In the matter of

1998 and 1999
Cable Royalty
Distribution Proceedings

ORIGINAL

Docket No. 2001-8 CARP CD 1998-99

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GENERAL COUNSEL
OF COPYRIGHT

REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

OF THE

CANADIAN CLAIMANTS GROUP

Dated: September 5, 2003

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Re: Distribution of 1998-1999 Cable Royalty Funds
Docket No. 2001-8 CARP CD 98-99

Dear Ms. Grimes:

Enclosed please find an additional copy of the Canadian Claimant Group's Reply Findings of Fact and Conclusion of Law, bringing the total number of copies to five.

Please do not hesitate to call if you have any questions about this document.

Sincerely,



L. Kendall Satterfield

Enclosures

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**REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

OF THE

CANADIAN CLAIMANTS GROUP**

I. INTRODUCTION

The Canadian Claimants Group ("CCG") hereby replies to the Proposed Findings of Fact and Conclusions of Law proffered by the other Phase I claimant groups.

Since the inception of its involvement in Copyright Royalty Proceedings, the CCG has endeavored to offer a reasonable, straight-forward method to calculate the payments to which its members are entitled. The CCG's efforts have taken into account the notion that because its members are Canadian, its member programming originates in Canada, and its sphere of retransmission is limited to the Canadian Compulsory Zone, the yardsticks by which other claimants' royalty remuneration is calculated may not be suited to measure the royalties owed to Canadian claimants.

Now, the CCG has presented the Canadian Survey and Canadian Content Analysis, optimistic that these submissions constitute solid and accurate evidence that will allow the Panel to deduce a reasonable royalty allocation for the CCG. The CCG believes that such evidence will serve two purposes: (1) enlighten the Panel as to the amount of royalties due

CCG members, as such royalties are not adequately contemplated by the other claimants' formulae; and (2) present a methodology that does not frustrate the efforts of the other claimants to measure the royalties owed to them. Specific to the latter point, the CCG has not attempted to persuade the Panel that its methodology is the most appropriate means by which to measure the allocation to Public Television or any other claimant group.

As will be discussed below, nothing in the proposed findings of fact or conclusions of law submitted by the other claimants undermines the substantial evidence offered by the CCG. Accordingly, the CCG requests a net award of 2.25073% of the 1998 and 2.47694% of the 1999 Basic cable royalty funds, and 0.17301% of the 1998 and 0.42946% of the 1999 3.75% Rate royalty funds.

II. THE CCG'S EVIDENCE OF CHANGED CIRCUMSTANCES JUSTIFYING AN INCREASE IN THE CCG'S AWARD REMAINS UNREBUTTED

A. The Panel Should Apply the Changed Circumstances Standard in Deciding to Increase the CCG's Award

In 1998 and 1999, cable operators paid \$216 million for the right to retransmit distant signals. (Written Direct Testimony of Marsha Kessler ("Kessler Dir.") at 10). The royalties paid are supposed to compensate the owners of the copyrighted works that were retransmitted. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63036 (Sept. 23, 1980) ("1978 Proceeding"). The only way to ensure that the money paid by a cable operator for retransmitting a signal containing specific works makes it to the owners of those works is to tie the owners' awards to the royalties paid.¹

¹ This linking concept is not new. It was incorporated into the "eligibility" concept used by the Copyright Royalty Tribunal in its 1989-1991 Satellite Royalty Distribution Proceeding and by the Copyright Arbitration Royalty Panel as part of its "per performance metric" established in the 2000 Digital Performance Rights rate setting proceeding. See Consolidated 1989-1991 Satellite Carrier Royalty Distribution Proceeding, 57 Fed. Reg. 62422 (Dec. 30, 1992) ("Satellite Decision"); *Report of the Copyright Arbitration Royalty Panel, In re Rate Setting for Digital Performance Right in Sound Records and Ephemeral Recordings*, 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002) at 37. Eligibility ensures that no party is under-compensated and no party is over-compensated.

The task of this Copyright Arbitration Royalty Panel ("Panel"), then, is to allocate to the six groups of litigating copyright owners only the royalties that each of those copyright owners are eligible to receive. In doing so, the Panel must give precedential value to the 1990-1992 awards. *See* 17 U.S.C. § 802(c). The Panel may deviate from precedent only if it provides a reasoned explanation of its decision. Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653, 55659 (Oct. 28, 1996) ("1990-1992 Proceeding").

The recognized standard for determining whether to vary from prior precedent is "changed circumstances." The Copyright Royalty Tribunal first adopted the "changed circumstances" criteria for the distribution of the 1980 cable copyright royalties. 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9564 (March 7, 1983), *aff'd* National Association of Broadcasters v. Copyright Royalty Tribunal, 777 F.2d 922, 932 (D.C. Cir. 1985) (appropriate to utilize "changed circumstances" standard so long as not the sole standard). In addition to changed circumstances, the Panel may alter prior awards where the evidence shows that the conclusions of earlier Tribunals or CARPs were wrong. Id.

B. The Record Evidence Demonstrates Changed Circumstances Which Justify an Increase in the CCG's Award

The present proceeding was initiated because there are significant changed circumstances since the last proceeding. The purpose of this proceeding is to determine how the various parties have been affected by those changed circumstances. Some parties' awards will have to be decreased and some will be increased. Despite acknowledging that the CCG is entitled to an increase over its 1990-1992 award, the Joint Sports Claimants ("JSC") suggest that there have been few changed circumstances that affect the Canadian Claimants. (Proposed Findings of Fact and Conclusions of Law of Joint Sports Claimants ("JSC Facts") 378, p.226.) That is utterly incorrect. As the CCG has demonstrated, changed circumstances warrant a significant increase in its award. Specifically, the nature of the overall cable retransmission market has changed, making Canadian signals a more important part of that market:

- Since the last litigated cable royalty distribution proceeding, the 1990-1992 Proceeding, the total royalty pool has decreased by almost half. Although this reduction resulted, in small part, from changes in the regulatory environment, the primary cause of the reduction was that U.S. cable systems no longer carried commercial television stations such as WTBS and WWOR as distant signals. Canadian programming was not carried on these signals.² Therefore, removal of these signals from the distant signal royalty pool increased the value of Canadian programming relative to the value of the programming that was carried on such dropped signals. (See Proposed Findings of Fact and Conclusions of Law of the Canadian Claimants Group ("CCG Facts") § II.C.2.)
- The amount of royalties paid for the carriage of distant Canadian signals has nearly doubled as a percentage of overall royalties. (CCG Facts § II.C.3.)
- Since 1990-1992, the number of U.S. cable subscribers who have access to Canadian programming on Canadian distant signals has increased by more than 25% even while the total number of distant subscriber for all distant signals has decreased by 45%. (CCG Facts § II.C.5.)
- On a relative basis, the share of distant signal programming attributable to the CCG has increased 268% in this same period. (CCG Facts § II.C.5.) This 268% percent increase represents an increase in the amount of programming deliberately purchased by cable operators. (Proposed Findings of Fact and Conclusions of Law of National Association of Broadcasters ("NAB Facts") at p. 21-23.)

² The CCG has never made a claim for any programming that was retransmitted on WTBS. (CCG Facts ¶ 1.) In this regard, Arthur Gruen was incorrect when he asserted that PBS was the only claimant group without programming on WTBS. (See Program Suppliers' Proposed Findings of Fact and Conclusions of Law ("PS Facts") ¶ 401.)

- U.S. cable operators who are able to select from an array of Canadian signals carrying varying amounts of Canadian content predominantly select those Canadian signals containing the greatest percentage of Canadian content. (CCG Facts §§ II.B.2 and II.D.)

Even while Canadian signals were becoming a larger force in the general market, the value of CCG content on those signals was holding steady and by some measures, increasing. In particular:

- Since 1990-1992, the weighted percentage of Canadian content on Canadian signals retransmitted in the United States has increased from approximately 70% to approximately 80%. (CCG Facts §§ II.B.2 and II.D.)
- The results of the latest survey of U.S. cable systems retransmitting Canadian signals show that cable operators continue to value Canadian content more than any other content on Canadian signals and that the valuation of Canadian content has been relatively steady over the years, maintaining a long term average of 61% and increasing from 51% in 1991-1992 to 59% in 1998 and 1999. (*See* CCG Facts § II.E.)
- The average broadcasting day of retransmitted Canadian stations was longer in 1998 and 1999 than in 1990-1992, representing increased value to cable operators. (CCG Facts § II.B.3.)

These changed circumstances—which are accurately captured by the CCG’s proposed allocation methodology—are summarized in the following table:

| CHANGED CIRCUMSTANCES JUSTIFY AN INCREASE IN THE CCG’S ROYALTY AWARD | | | | |
|---|------------------------------|------------------------------|------------------------------------|--|
| Changes in the Distant Signal Marketplace | | | | |
| | Average 1990-1992 | Average 1998-1999 | Relative Percent Change | Source |
| Total Distant Royalties | \$173,213,264 | \$79,302,475 | ↓ 54% Decrease | CCG Facts ¶ 59 |
| Total Basic Fees | \$128,936,468 | \$69,177,726 | ↓ 46% Decrease | CCG Facts ¶ 59 |
| Total Subscriber Instances for All Signals | 122,365,161 | 67,814,694 | ↓ 45% Decrease | CCG Facts ¶ 71 |
| Changes in the Canadian Share of that Marketplace | | | | |
| | Average 1990-1992 | Average 1998-1999 | Relative Percent Change | Source |
| All Distant Royalties Paid for Canadian Signals as Percentage of All Royalties (excluding Minimum Fees) | 1.58% | 3.12% | ↑ 97% Increase | CCG Facts ¶ 62 |
| Basic Royalties Paid for Canadian Signals as Percentage of Basic Royalties | 1.97% | 3.48% | ↑ 77% Increase | CCG Facts ¶ 62 |
| Canadian Share of Distant Subscriber Instances | 1.55% | 3.59% | ↑ 132% Increase | CCG Facts ¶ 72 |
| Canadian Programming as a percentage of all retransmitted programming | 1% | 3.68% | ↑ 268% Increase | CCG Facts ¶ 74 |
| Canadian Distant Subscriber Instances | 1,896,833 | 2,432,564 | ↑ 28% Increase | CCG Facts ¶ 71 |
| Changes in the Value of Canadian Programming on Canadian Signals | | | | |
| | Average 1990-1992 | Average 1998-1999 | Relative Percent Change | Source |
| CCG Content’s share of Canadian Survey | 51% | 59% | ↑ 16% Increase | CCG Facts ¶ 92; 1990-1992 CCG Facts ¶ 197 |
| Fee-Weighted Canadian Content | 71% | 80% | ↑ 13% Increase | CCG Facts ¶ 4; Exhibit CDN-4-D; 1990-1992 CCG Facts ¶ 55 ³ |

³ Excerpts from the 1990-1992 Proposed Findings of Fact and Conclusions of Law of the CCG (“1990-1992 CCG Facts”) are attached as Exhibit 1.

Because cable operators value the CCG content on Canadian distant signals to the same or greater extent than they did in 1992 and because Canadian signals have substantially increased their presence in the distant signal market on a relative basis, the CCG is entitled to an increased award.

III. THE CCG'S METHODOLOGY FOR DETERMINING ITS ROYALTY SHARE IS THE BEST METHOD OFFERED BY ANY PARTY AND REMAINS UNREFUTED

A. The CCG's Methodology, Which is Based Upon Royalty and Valuation Data contained in the Record, Remains the Proper Method for Determining the CCG's Award

In this proceeding, the CCG has produced compelling evidence indicating that it should be awarded 70% of the royalties paid for distant Canadian signals. No claimant group has offered evidence of the value of Canadian programming on retransmitted distant signals superior to that provided by the CCG. In fact, the key attributes of the CCG's allocation methodology stand unrefuted:

- The methodology is aligned with the purpose of the compulsory licensing scheme because it uses royalty data to tie royalties paid for retransmission to the programs actually retransmitted. This ensures that the CCG receives a fair share of royalties while preventing the CCG from receiving royalties paid for signals on which its programming did not appear.
- The methodology improves the ability of the Panel to determine the relative marketplace value of niche programming by focusing the inquiry on those distant signals on which the programming can be found.

- The royalty data is readily understandable, even if it is time consuming to work with and has nuances arising from the interaction of the Minimum Fee with the Basic and 3.75% Rate fees.
- The quantitative evidence of the value of Canadian programming—the Canadian Survey and Canadian Content Analysis—are based on actual data provided by cable operators or by Canadian broadcasters. They contain no speculative assumptions, abstruse manipulations or theoretical statistical adjustments. Nor is the CCG’s case based on rigged hypotheticals, vague possibilities, or unsupported expert musings.
- The methodology inherently takes into account changes in the makeup of the royalty pool, such as the conversion of WTBS, and will adapt to future changes such as the increase or decrease in the carriage of Canadian signals.
- The methodology facilitates early settlement for future royalty controversies between the CCG and other parties by providing an objective means for determining the CCG’s royalty shares. This also will reduce the complexity of distribution proceedings for non-settling parties.
- The award that results from the methodology is reasonable and comports with common sense. On this last point, perhaps the strongest proof is that the three largest claimant groups, Program Suppliers, JSC, and the National Association of Broadcasters (“NAB”), have all endorsed the CCG’s fee-based approach and have recommended an increase in the CCG’s award.⁴

⁴ The Music Claimants did not address or propose an award for the CCG. The Public Television Claimants (“PTV”) also did not propose any specific award for the CCG, but instead offered a “remainder theory,” which provides that the CCG should get whatever was left over after the other awards were determined. As shown, *infra*, this theory should be rejected because, among other reasons, it is arbitrary.

In short, the CCG methodology remains the most accurate and legally well-grounded method of determining an award for the CCG. Like all parties to these proceedings, the CCG believes that the compulsory license scheme under-compensates copyright owners because the royalties do not approach the true fair market value of the programming. The CCG methodology is a concession to the reality of that situation, not a concession that Canadian programming is worth less than other retransmitted programming.

The CCG believes that the royalties paid for Canadian signals are the best starting point for determining an award to the CCG. The next step in making an award is to determine (among the claimants eligible to participate in those royalties) the relative value of the programming on those signals. That can be done using the Canadian Survey sponsored by Dr. Debra Ringold⁵ in conjunction with the Canadian Content Analysis sponsored by David Bennett.⁶

B. Other Parties Recognize that Their Quantitative Analyses do not Properly Measure the Value of Canadian Programming

As expressly stated by NAB, “None of the quantitative measures in this proceeding are able to provide reliable figures for the relative value of the Canadian programming in the distant signal marketplace.” (NAB Facts ¶ 238.)

With regard to NAB’s Rosston regression analysis, NAB has acknowledged that, “Dr. Rosston admitted that a possible reason for the Canadian coefficient not being statistically significant was the small number of observations for Canadian programming.” (NAB Facts ¶ 239.) Of course, as shown during the hearings, there can be little reliance on the Rosston regression study. After removing subscribers from the regression, the programming variables (upon which royalty distributions were to be based) explained only 2% of the variability in royalties. (CCG Facts ¶¶ 109-10; JSC Facts ¶ 152; PS Facts at pp.

⁵ See CCG Facts ¶ 84, “The Value of Canadian Programming to Cable Systems in the United States: 1996-1999” (“Canadian Survey”).

⁶ Exhibit CDN-4-D; CCG Facts ¶ 121.

158-59.) Thus, the explanatory power of the Rosston regression is negligible and should be rejected. Certainly, putting aside all other criticisms of the Rosston regression (and there were many) the standard for the explanatory power of a regression used to allocate over \$200 million must be higher than 2%. Indeed, the 1990-1992 CARP rejected as insufficient a regression analysis sponsored by Program Suppliers with a 30% explanatory power. *See Report of the Panel in Docket No. 94-3 CARP CD 90-92* ("1990-1992 CARP Report") at 76 (May 31, 1996).

The JSC sponsored Bortz study was also unable to accurately measure the value of Canadian programming. JSC concedes this point by quoting their own Bortz report: "the survey methodology is not designed to develop estimates with small relative error rates for programming carried by fewer than four percent of systems and that (when measured across all systems) accounts for only fractions of a percentage point of value." (JSC Facts at ¶ 118, citing JSC Ex. 1 at 43 (emphasis added).) While JSC attempts to shore up Bortz by suggesting a correlation between data in the 1990-1992 Canadian and the 1990-1992 Bortz surveys (JSC Facts ¶ 119), in the end the Canadian award it proposes relies predominantly upon fees and the CCG's valuation data. (*See* JSC Facts at p. 223.)⁷

Finally, the Nielsen study sponsored by Program Suppliers only measured and reported viewing on U.S. signals and did not attempt to measure the viewing on Canadian

⁷ The correlation between the 1990-1992 Bortz and Canadian surveys was closely examined in the 1990-1992 proceeding and while Dr. Debra Ringold did acknowledge that the correlation bolstered her confidence in the Canadian survey, she expressly rejected the contention that the results of the Bortz Survey or her own "Bortz Question" provided any meaningful valuation for Canadian programming (*See e.g.*, 1990-1992 Transcript of Oral Testimony of Dr. Debra J. Ringold ("Ringold Tr.") at 7760-61, 7764-65, 7860, 7881.) Moreover, the 1990-1992 CARP, which heard extensive testimony on this issue as well as the broader application of the Bortz study to the Canadian programming, held that the Bortz study was "totally unreliable" at valuing Canadian programming. *1990-1992 Proceeding*, 61 Fed. Reg. at 55666.

signals. (PS Facts ¶¶ 91-92, 242-45; CCG Facts ¶ 113.) It therefore provides no data that can be used to value Canadian distant programming.⁸

IV. PROGRAM SUPPLIERS, JSC AND NAB HAVE ALL ACCEPTED THE BASIC CONCEPTS BEHIND THE CCG METHODOLOGY BUT HAVE PROPOSED FLAWED IMPLEMENTATIONS OF THAT METHODOLOGY

A. Program Suppliers, JSC and NAB Have Each Acknowledged that the CCG's Methodology is the Proper Method for Determining an Award to the CCG

The National Association of Broadcasters ("NAB"), JSC and Program Suppliers now appear to accept what the CCG has long argued, that the CCG is entitled to receive an award based on the royalties paid for the signals on which its programming appears.⁹ For example, "Program Suppliers agree that the appropriate starting point for determining the Canadians' award is the fees generated for Canadian signals." (PS Facts at p. 232.) Indeed, these three parties have proposed using the CCG methodology to calculate the CCG's award because, in part, they recognize that the more comprehensive studies they have

⁸ It is worth noting, however, that regardless of how it has historically been characterized the application of the Nielsen study as a tool for determining the relative value of programming on U.S. signals mirrors the CCG's methodology for Canadian signals. Both methodologies identify a set of signals on which particular types of programming appear and then apply valuation measures for just those programming types on just those signals in an attempt to allocate the royalties generated by those signals.

⁹ The CCG also historically has received, and in this proceeding seeks, a proportionate share of fees paid for the general right to carry distant signals (*i.e.*, Form 1, Form 2 and Minimum Fee royalties).

sponsored do not accurately measure the value of Canadian programming retransmitted in the U.S.¹⁰

B. The Implementations of the CCG Methodology by NAB, Program Suppliers, and JSC Rely on Arbitrary Assumptions or Incorrect Data and Are Therefore Defective

While Program Suppliers, NAB and JSC each proposed an award to the CCG pursuant to a royalty-based methodology, each claimant incorporated subtle manipulations of the royalty data and the methodology with the intended effect of diminishing the CCG award while still claiming to give the CCG “exactly what has been paid for the carriage of Canadian distant signals.” (NAB Facts ¶ 242.) Program Suppliers propose that the CCG receive a share of fees paid for Canadian distant signals based on an “adjusted” Canadian Survey. (See PS Facts at p. 235.) NAB proposes the Canadians receive their Canadian Survey share of fees, though they mixed and matched the royalty numbers. (See NAB Facts ¶ 24.) Finally, JSC proposes a blend of two methodologies, one that roughly follows the CCG methodology (but mixes and matches the royalties) and one that attempts to graft a partial fee-based approach to a partial Bortz approach. (See JSC Facts ¶ 379.) Both the NAB and JSC approach also minimize the value of Canadian programming on Canadian distant signals.

The Panel should reject these proposals because they do not fairly measure either the fees paid for Canadian signals or the relative value of that programming. Yet, while the CCG disagrees with the implementation of its methodology by these parties, there is no disputing that each of these claimants has acknowledged that fees are the proper starting point for an allocation of royalties to the CCG. Each of these proposed CCG awards is grounded in the fees paid for Canadian signals.

¹⁰ The CCG has repeatedly stated that it is not advocating that the CCG methodology be applied to PTV. Nevertheless, PTV has urged the Panel to reject the CCG’s methodology because of the potentially adverse impact the concept of eligibility would have on PTV’s claim for royalties. PTV’s claim exceeds the amount of royalties paid for the signals on which PTV programming is found and therefore the PTV claim must tap into the royalties paid for signals on which its programming did not appear. Presumably, PTV is concerned that application of the eligibility criteria to PTV could limit its claim.

1. Program Suppliers Arbitrarily Minimize the Value of Canadian Programming on Canadian Distant Signals

Program Suppliers adjust the CCG methodology by arbitrarily discounting the value of Canadian programming, as assessed by cable operators, by 25%. The stated purpose of this adjustment is to account for (1) Program Suppliers' unsubstantiated contention that the Canadian Survey actually shows that cable operators choose Canadian distant signals for their U.S. programming content, and (2) "problems inherent in the survey." (PS Facts at pp. 234-35.) This discount should be rejected for several reasons.

First, the quantification of the 25% is unsupported by expert testimony or even reasoned argument that grounds the adjustment in the record.¹¹ Second, the argument does not ring true: It is hard to believe that a meaningful percentage of U.S. cable operators would choose Canadian distant signals for their U.S. programming content when they could choose to retransmit any of hundreds of U.S. distant signals containing 100% U.S. programming that cost the same or less than the Canadian signals.¹² Second, the criticisms of the survey do not address any issue that materially alters the survey results. For example, Program Suppliers criticize the study because when surveying the value of

¹¹ Program Suppliers' arbitrary adjustment fails to comport with the Panel's admonition regarding criticisms of expert reports:

[A]ny party who intends to argue that a particular expert's study or analysis should be disregarded because of methodological errors should be prepared to demonstrate, via evidence of record, that such errors materially affected the accuracy or reliability of the conclusions of the study or analysis.
(Panel's "QUESTIONS FOR THE PARTIES", Appendix A, Number 1.)

¹² This contention is further disproved by examining the carriage of CKSH, listed by Program Suppliers in its argument. CKSH, a French-language Canadian station, is carried exclusively by cable systems operating in those regions of the Canadian Compulsory Zone with the highest percentage of Americans of French-Canadian ancestry. (CCG Facts ¶¶ 30-32.) In general, Program Supplier's proposed modifications to the CCG methodology and Canadian Survey results rely heavily on Dr. Gruen's rebuttal testimony, which is replete with unsubstantiated conclusions. Another example is Dr. Gruen's dismissal of the increase in Canadian distant subscribers, attributing it to a phantom northern migration of the U.S. population. (PS Facts ¶ 528.)

French-language programming, Dr. Ringold did not determine whether the respondent—an American cable system executive—spoke French. (PS Facts at p. 234.) One might just as well argue that cable executives need to be children to value children’s programming in their channel lineup.¹³ Third, Dr. Ringold has testified that the study is remarkably robust and has shown reliability over the many years it has been conducted. (Ringold Tr. at 5573-75, 5639.) Finally, the CARP and Librarian of Congress used the survey results in the 1990-1992 proceeding without such a downward adjustment. *See e.g., 1990-1992 Proceeding*, 61 Fed. Reg. at 55663-64.¹⁴ Program Suppliers’ discount to the survey results should be rejected.

Program Suppliers also argue that the Canadian Content Analysis sponsored by David Bennett should be rejected because it does not provide any evidence of the relative value of Canadian programming. (PS Facts at p. 233; *see also* JSC Facts ¶ 376.) Exhibit CDN-4-C shows a breakdown of the programming time per signal and Exhibit CDN-4-D analyzes this in the context of actual carriage. Thus, while it incorporates programming time, the Canadian Content Analysis is not a simple “time study.” Rather, the analysis documents that U.S. cable operators selectively carried Canadian signals with higher

¹³ Program Suppliers’ argument about the systems carrying French-language signals is a variant on their criticism that the survey respondents may not have cared about the response they gave. (PS Facts at p. 234.) Underlying such criticisms is the assumption that cable company executives are generally incompetent and unable to answer simple questions going to the core of their day-to-day responsibilities. This assumption is unsubstantiated and conflicts with the basic premise of these royalty distribution proceedings that one can determine the fair marketplace value of programming by looking at information derived from the cable retransmission industry. If one assumes the cable industry executives are not competent to undertake the purchase of distant signals and cable networks, one can hardly rely on the market transactions as a guide to royalty distributions.

¹⁴ The Librarian used 56% as the value of Canadian programming in its correction of the Panel’s 3.75% Rate award. This number corresponds to the four-year average that Dr. Ringold presented in her 1990-1992 testimony. (*See 1990-1992 CARP Report* at p. 136; 1990-1992 CCG Facts ¶ 197 (attached hereto as Exhibit 1.) The CARP apparently used 51%, the average from just 1991 and 1992 (the only years at issue for the CCG in the 1990-1992 Proceeding) in reaching its award to the CCG of 1.00% of Basic Royalties (51% times 1.97% of Basic Royalties equals 1.00%). (*See Id.*) This appears to have dovetailed with the Panel’s conclusion that a one-third increase was sufficient. *1990-1992 Proceeding*, 61 Fed. Reg. at 55667.

amounts of Canadian programming. (CCG Facts ¶ 4.) In addition, it shows that the actual makeup of programming retransmitted in the United States had a higher percentage of Canadian content than a pure time analysis would otherwise suggest. (CCG Facts ¶ 19.) This evidence should be used to draw the logical inference that U.S. cable operators choose to carry those Canadian signals with higher Canadian content because those are the signals that provide the most unique programming to the system's channel line-up.

Moreover, Program Suppliers' argument devaluing the impact of time seems disingenuous. Program Suppliers have long relied on the Nielsen studies in seeking a royalty share. (PS Facts at pp. 156-57; JSC Facts ¶¶ 156-58.) The results of the Nielsen study obviously are affected by the amount of time the programming categories are broadcast. A comparison of the Nielsen results and the Fratrik Time Study, for the claimant groups common to both studies, shows that viewing correlates very closely with the volume of programming available (*i.e.*, time):

| Category | 1998-1999 Fratrik Time Study (NAB Facts ¶ 22) | Average 1998-1999 Nielsen Household Viewing (PS Facts p. 167) |
|---------------------|---|--|
| Program Suppliers | 60.38% | 60.0% |
| Commercial TV | 13.00% | 14.7% |
| Public Broadcasting | 14.87% | 16.0% |
| Sports | 4.91% | 8.5% |
| Devotional | 2.94% | 0.8% |

In fact, the first three programming categories account for 88% percent of the time and 90% of the viewing—hardly a coincidence. The only two areas of marked divergence between time and viewing are for JSC and Devotional programming, and the explanation for that divergence has long been documented in prior CRT and CARP proceedings.

Again, the CCG does not suggest that time is a primary factor in these proceedings but it is a factor inherent in the allocation of royalties.¹⁵ Time is a measure of the programming actually retransmitted and therefore it underlies the validity of claims of all

¹⁵ Despite the assertions of various parties, time has never been excluded completely as a factor in these proceedings. See discussion of "time plus fee generation" in section V.C, *infra*.

parties because Section 111 only allows the CARP to compensate the copyright holders of eligible programming, that is, programming actually retransmitted. Accordingly, the results of the Canadian Content Analysis are a factor that should be considered in determining the relative value of Canadian programming on Canadian distant signals.

2. NAB Arbitrarily Compares Canadian Basic Royalties to Basic Royalties Plus the Minimum Fees, Unfairly Reducing the CCG's Share of the Basic and Unallocated Funds

NAB argues that the CCG should receive 1.46% of the Basic Fund for 1998 and 1.59% for 1999. (NAB Facts ¶ 241.) NAB arrives at these numbers by applying the CCG's Canadian Survey share to NAB's calculation of fees paid for Canadian distant signals. As noted above in discussing Program Supplier's proposal, the CCG believes that using just the Canadian Survey share under-represents the total value of Canadian programming on Canadian distant signals and that the Panel should factor in the Canadian Content Analysis, resulting in a 70.5% share for the CCG. (See CCG Facts, Appendix B.)

NAB compounds its error by improperly computing the royalty data used to calculate the percentage of royalties paid for Canadian distant signals. NAB starts by accurately identifying the Basic royalty fees that cable systems paid for Canadian distant signals: \$2,239,646 in 1998 and \$2,588,064 in 1999. (NAB Facts ¶ 241, citing Exhibit CDN-4-B at 4.) Then, however, NAB improperly divides these numbers by Basic royalties *plus Minimum Fee* royalties. Because Minimum Fees add more than \$20 million per year to the denominator, the result is a substantially lower percentage for Canadian Basic royalties. Rather than dividing by \$90,562,603 and \$94,195,296 for 1998 and 1999, respectively, as NAB does, the proper denominators are \$67,387,814 and \$70,967,638—the Basic royalties without the Minimum Fees. (See CCG Facts, Appendix A.) Using the correct numbers shows that cable systems actually paid 3.31% and 3.64% of *Basic royalties* in 1998 and 1999 for the carriage of Canadian distant signals. (*Id.*)

To be clear, the reason this is important is that NAB's calculation would deny the CCG its right to share on a pro rata basis with all other claimants any of the Form 3

Minimum Fee royalties and would reduce its share of the royalties paid by Form 1 and Form 2 systems. This is illustrated in the following example:

Assume that royalties are as shown in the following table (which uses approximate royalty numbers based on the 1998 royalty data in the CCG's Appendix A and the Written Direct Testimony of Marsha Kessler):

| | Basic Royalties | Minimum Fee Royalties | Form 1 and Form 2 Royalties | Total |
|---|----------------------------|--------------------------------------|--|--------------|
| Total (Approx.) | \$65,000,000 | \$22,000,000 | \$4,500,000 | \$91,500,000 |
| Allocable to Canadian Signals by CDC (Approx.) | \$2,200,000 | | | |

Using NAB's calculation (which divides Canadian Basic royalties by All Basic royalties *plus* All Minimum Fee royalties) would result in 2.529% share for Canadian signals. Using the CCG calculation (which divides Canadian Basic royalties by All Basic royalties) would result in 3.385%.¹⁶

Putting aside the issue of allocating those royalties among the CCG, JSC and Program Suppliers, and treating the amount as that due to all claimants to Canadian signal royalties, the Librarian would take the resulting number, either 2.529% or 3.385%, and apply it to the Librarian's version of the Basic royalty fund. That Fund consists of all royalties except 3.75% Rate and Syndex royalties or, stated alternatively, the sum of all Form 3 Base Rate funds, the Form 3 Minimum Fees, the Form 2 fees, and the Form 1 fees.¹⁷ The two possible results would be the allocations shown in the following table:

¹⁶ By definition, the CCG approach is the correct method of figuring out the amount of Basic royalties paid by cable systems for Canadian distant signals as a percentage of Basic royalties paid by cable systems for all distant signals.

¹⁷ With the exception of the limited data presented by Marsha Kessler in her overview of the compulsory licensing scheme, all royalty data used in these proceedings are based on Form 3 royalties which account for more than 95% of all royalties. (Kessler Dir. at 10.)

| | "Canadian Signal" Percentage | Approx. Royalties That Will Be Distributed By Copyright Office As "Basic Fund" | "Canadian Signal" Distribution |
|---------------------------------------|-------------------------------------|---|---------------------------------------|
| CCG Calculation | 3.385% | \$91,500,000 | \$3,097,275 |
| NAB Calculation | 2.529% | \$91,500,000 | \$2,314,035 |
| Shortfall from NAB Calculation | | | \$783,240 |

Thus, in this example, the NAB approach denies the claimants to Canadian signal royalties \$783,240 in "Basic Fund" royalties, which not only include all of the Minimum Fees¹⁸ but a portion of the Form 1 and Form 2 royalties. This shortfall is effectively a zero award for Minimum Fees and a disproportionate reduction in the share of the Form 1 and Form 2 royalties.

In short, the CCG should not be arbitrarily denied a pro rata share of Form 1, Form 2, and Minimum Fee royalties which are not attributable to the carriage of any particular signal or programming. Certainly, as the legislative history makes clear, royalty fees are not paid for the carriage of local signals. H.R. Rep. No.94-1476, at 97 (1976). Historically, Form 1, Form 2, and Minimum Fee royalties (to the extent they were paid), were distributed in accordance with the allocation of Form 3 Basic royalties. 1978 Proceeding, 45 Fed. Reg. at 63042. No party has ever seriously contested this distribution methodology. There is no reason to depart from that practice now and no substantive expert testimony was offered in this proceeding to justify an alternative allocation.¹⁹

3. The Blended Methodology of JSC is a Fee-Based Approach but Suffers from A Number of Defects

JSC suggests that the CCG should receive an award that averages together (1) its own version of the CCG methodology and (2) a hybrid approach suggested by Mr. Trautman (blending together Bortz data with some aspect of a fee-based approach). (JSC

¹⁸ In this example, the "Canadian Signal" share of Minimum Fees is \$744,700 (which is 3.385% of \$22,000,000.)

¹⁹ JSC also has acknowledged that this is the proper means of distributing the Minimum Fees. (JSC Facts at p. 17 n.3.)

Facts at pp. 223-26.) The latter method should be rejected because it relies on the Bortz survey, already established to be unreliable as a source of relative valuation data for Canadian programming. No amount of adjusting or tweaking can overcome the fact that the Bortz survey presents data from a sample of just 2 to 3 systems carrying Canadian distant signals.

JSC's other approach, which Mr. Trautman refers to as the "1990-1992 CARP approach," is the proper methodology (and was presented by the CCG), but is applied incorrectly. Mr. Trautman makes three primary errors in his application that reduce JSC's proposed award to the CCG.

First, he uses only one accounting period of data rather than full year data. This error inherently provides for inaccurate results when attempting to allocate an entire year's royalties. Second, and far more importantly, Mr. Trautman uses distant Basic royalty data *plus 3.75% Rate fees*. While this does not create the same problem as NAB's use of Basic plus Minimum Fee royalties, it creates a new problem. In 1998, for example, 3.31% of the Basic royalties were paid for Canadian signals while only 0.25% of the 3.75% Rate royalties were paid for Canadian signals.²⁰ When combined, Canadian signals accounted for 2.93% of the combined 1998-1 Basic and 3.75% Rate royalties as shown below:

²⁰ JSC points out that one system was responsible for 40% of the royalties paid for Canadian signals. (JSC Facts ¶ 369.) This is true for 1999 only and resulted from numerous mergers of smaller systems, all of which carried Canadian station CBUT as a distant signal. (Bennett Tr. 5353; Written Rebuttal Testimony of David Bennett at 6 n.2; Exhibits CDN-1-X, CDN-R-1-B.) Only one of those systems was the Seattle system that was the subject of the news article provided by JSC during the cross of Mr. Bennett. (Exhibit JSC 41-X.) The intensity of the subscriber pressure described in the article is proof of the avidity of certain subscribers as the cable system was compelled, due to subscriber activism, to put CBUT back on the system as soon as it had dealt with the capacity issue. This demonstrates that the cable system is not just using the Canadian station as a placeholder but rather is carrying it in response to a vocal group of subscribers. This outcome demonstrates that cable system operators continue to attempt to offer a diverse channel lineup to satisfy subscriber demand and that such operators value Canadian signals because they provide the necessary diversity.

| | Basic Royalties | 3.75% Rate Royalties | Totals |
|-------------------|-----------------|----------------------|---------------|
| Canadian | \$ 2,230,717 | \$ 24,539 | \$ 2,255,256 |
| Total | \$ 67,387,814 | \$ 9,671,797 | \$ 77,059,611 |
| Percentage | 3.31% | 0.25% | 2.93% |

(See CCG Facts Appendix A.)

Under JSC's approach, the 2.93% number would then be used just for allocating the Basic royalties. Yet, JSC also asserts that the CCG should get just its actual "fee gen" share of 3.75% Rate fees.²¹ (JSC Facts ¶ 392 (showing that the fees paid for Canadian signals were just 0.25% and 0.63% of the 3.75% Rate royalty funds.) JSC offers no justification for this approach and none exists in the record. Combining the 3.75% Rate and Basic royalties to come up with a lower percentage denies the CCG a fair share of the Basic royalties as well as the Form 1, Form 2, and Minimum Fee royalties.

Finally, JSC, following Mr. Trautman's testimony, then only awards the CCG a share of these already-diminished royalties based on the Canadian Survey share without taking into account the value shown by the Canadian Content Analysis. As discussed in

²¹ JSC notes that the 1983 CRT made two adjustments to the CCG's 3.75% Rate royalty award. (JSC Facts ¶ 385, citing 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12813-14 (April 15, 1986).) One change was a decrease in the award to account for the fact that no 3.75% Rate fees were paid for French-language Canadian signals because they are "specialty stations." In this Proceeding, like the 1990-1992 Proceeding, the CCG theory already takes into account the fact that no 3.75% Rate fees are paid for French-language Canadian signals by limiting the CCG to a portion of only fees actually paid. Therefore, no such downward adjustment should be made in this Proceeding. The other 1983 adjustment was an increase "based on the difficulty of identifying the particular 3.75% signal carried, given that it was left to the cable system to choose which signal to report for calculating 3.75% Rate royalties. The CRT found that the Canadian signals should be given slightly more credit in light of this arbitrariness." (*Id.*) Because the CCG did not present evidence documenting this adjustment, we do not seek such an upward adjustment from this CARP. Nevertheless, it is appropriate to recognize that the CCG claim actually represents the low end of what was likely paid for Canadian signals.

section IV.B.1, *supra*, this fails to account for the full value of Canadian programming on Canadian distant signals.²²

In conclusion, NAB, Program Suppliers and JSC have all proposed that the CCG receive an award using fees as the starting point. Their applications are flawed, however, because all three parties have manipulated the data to artificially deflate the percentage of royalties paid for Canadian signals or have arbitrarily reduced the value of Canadian programming on those signals, or both. Proper application of the CCG methodology requires accurately measuring royalties and value. The accurate measurement of both is shown in the CCG's Appendices B-E to its Proposed Findings of Fact and Conclusions of Law.

**V. PTV'S "REMAINDER THEORY" IS CONTRADICTORY AND
CONTRARY TO THE PANEL'S MANDATE, THE RECORD EVIDENCE
AND PAST PRECEDENT**

The section in PTV's proposed findings and conclusions entitled "Rationale for Proposed Award for Each Claimant" is ironically named; the PTV approach reveals a complete absence of supporting rationale, at least with regard to assessing the CCG's award. Rather than support their suggested CCG award with any methodology, PTV instead recommends that the CCG "be allocated a remainder amount after the other parties' shares are established." (Proposed Findings of Fact and Conclusions of Law of Public Television Claimants ("PTV Facts") ¶ 649.) Because PTV's approach demonstrates contradictory reasoning, ignores record evidence and past precedent—which indicate the

²² JSC also suggests that the value of Canadian programming is diluted because some Canadian programming is also shown on U.S. broadcast stations and cable networks. (JSC Facts ¶ 368.) This dilution effect is not quantified by JSC. Also, to the extent such dilution actually takes place, it is offset by the substantial amount of non-compensable U.S. sports and series appearing on these stations. (See Transcript of Oral Direct Testimony of David Bennett ("Bennett Tr.") at 5305-07, 5312-14.) Given the offsetting effects of these issues, the relative valuations provided by the Canadian Survey and Canadian Content Analysis remain valid. The CCG also believes that the presence of Canadian programming on U.S. stations and cable networks is further proof of the appeal of Canadian programming to U.S. cable operators.

viability of the CCG methodology—and purports to expand the Panel’s authority to allow arbitrary royalty allocation, such an approach should be rejected.

A. PTV’s Proposal Is Contradictory

PTV’s argument starts with a contradiction, suggesting that the Panel award the CCG the royalties that “remain after the shares have been established for the other claimants” but recognizing that CCG’s royalties should at least match their 1991-1992 award. (PTV Facts ¶ 645.) This suggestion disregards the real possibility that—absent a specific determination of the CCG’s share, based on record evidence and past precedent—the Panel could adopt a combination of allocation theories from the other party claimants that total at or near 100%, leaving the CCG with either less than their 1991-1992 award or no remainder whatsoever.²³ Because PTV’s “Remainder Theory” may result in an award far below that to which the Canadian claimants are entitled—or no award at all—the Panel should reject this approach. *See Christian Broadcasting Network v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1305 (D.C. Cir. 1983) (noting that Tribunal determinations that award no royalty at all will be “scrutinize[d] carefully” and reviewed “with particular care”).

B. The Panel Is Not Authorized To Arbitrarily Allocate Royalty Awards

PTV’s recommendations should be rejected not merely because they are inherently contradictory, but also because they seek to expand the Panel’s authority beyond appropriate bounds. Allocations by the Panel “must be neither arbitrary nor capricious and must be supported by substantial evidence.” *Christian Broadcasting*, 720 F. 23d at 1304. Any review of the Panel’s allocation decisions will assess “the adequacy of the [Panel’s] explanations to ensure that the agency has genuinely engaged in reasoned decision-

²³ PTV offered a range of awards for all claimants that, when combined, accounted for 90.4% to 105.6% of Basic royalties leaving the CCG with a remainder award that ranged from negative 5.6% to positive 9.6% of Basic royalties. (PTV Facts ¶ 595.)

making.” *Id.* Without reliance on record evidence, the Panel’s determinations are arbitrary and must be rejected.

It is also important to note that much of the CCG’s evidence—including the Canadian Survey—is offered in response to the 1983 decision, wherein the Tribunal noted the necessity of demonstrating a “nexus to marketplace value” in assessing the Canadian claims. *1983 Cable Royalty Distribution Proceeding*, 51 Fed. Reg. 12792, 12813 (April 15, 1986). The CCG has provided that nexus in the form of a comprehensive survey of the relevant cable operator population and in the Canadian Content Analysis. The PTV approach not only ignores the general requirement that royalties should be allocated according to a reasoned analysis of the record evidence, but also disregards the specific “nexus” requirement articulated in the 1983 decision.

C. PTV’s Proposal Ignores Record Evidence and Past Precedent, Which Indicate the Viability of the Fee Generation Method Proffered by the CCG

The record contains ample evidence that the CCG methodology stands as the superior approach for the allocation of CCG’s award. See generally section III, *supra*. Moreover, approval for the CCG method can be gleaned from the modified royalties and value analyses offered by NAB, JSC and the Program Suppliers. See section IV, *supra*.

To avoid application of CCG’s methodology, PTV cites the testimony of CCG witness David Bennett that purportedly demonstrates that “the fees-generated approach” has been “repeatedly rejected in past cable royalty distribution proceedings.” (PTV Facts ¶¶ 301, 646 (citing Bennett Tr. at 5485).) Such citations are misleading. During the course of PTV’s cross-examination, Mr. Bennett confirmed the manner in which the fees-generated approach is being applied in these proceedings:

Q And that’s the reason you’ve come forward with the fees generate [sic] approach this time, because you believe that the Panel at least accepted it in some way as to the Canadian Claimants in particular?

A Yes. Yes. As it pertained to us, yes. (Bennett Tr. at 5488.)

Taken in context and in its entirety, such testimony can hardly be classified as “recognizing . . . the fact that [the fees-generated approach] has been repeatedly rejected in past cable royalty distribution proceedings.”

The “time-plus fee generation” royalty distribution formula was proposed by the Program Suppliers in the first cable royalty distribution proceeding, and was rejected because it would have allocated royalties *purely* on the basis of time.²⁴ 1978 Cable Proceeding, 45 Fed. Reg. at 63028, 63037. The CRT noted its rejection of the “automatic application of a pay-in pay-out formula,” which is likely a reference to the “time plus fee generation” formula. Satellite Decision, 57 Fed. Reg. at 62426 (emphasis added).

The 1983 Proceeding provides further evidence that the CCG’s method has support in precedent. In that proceeding, a motion was filed seeking to strike Devotional Claimants’ evidence based on the time-plus fee generated formula. The parties filed comments on the motion. The CRT, in its fashion, listed the positions of the parties before announcing its conclusion:

The Canadian Claimants disagree that the Tribunal has rejected time plus fee generated formula. They argue that the Tribunal has rejected it only as the sole criteria for allocating the royalty fund, and that the Tribunal left available its consideration of the formula as one of a variety of considerations and factors it may look to in allocating the fund.

In re 1983 Cable Royalty Fund Distribution Proceeding, No. CRT 84-1 83CD, Order dated Aug. 7, 1985 (attached hereto as Exhibit 2). In its discussion, the CRT concluded: “We

²⁴ The “time plus fee generated” methodology was initially proposed by MPAA (now Program Suppliers) in the 1978 Proceeding. Under that formulation, MPAA first allocated royalties to signals in a manner similar to that currently used by Cable Data Corporation. Then, MPAA allocated the royalties to programming based on the amount of time each programming type was shown on each signal. 1978 Proceeding, 45 Fed. Reg. at 63028. The Tribunal’s response to this time-based methodology was to limit its application. It was not an outright rejection: “The number of hours of cable carriage of particular kinds of qualifying programming was of some value to us. We found however that there were serious problems inherent in the use of any formulation which would allocate the royalty fees exclusively on the basis of hours of carriage in that such formulation fails to compensate copyright owners adequately for the use of their programming.” Id. at 63036-37 (emphasis added).

find that our view of the 1978 Cable Final Determination comes closest to the position advanced by the Canadian Claimants in their comments.” Id.

The 1987 Proceeding notes that “the time-plus fee generation has some relevance and could enter the record as part of the mix of evidence indicating the proper allocation.” 1987 Cable Royalty Distribution Proceeding, 55 Fed. Reg. 5647, 5651 (Feb. 16, 1990). Finally, the CARP and Librarian used a fee-based approach with regard to the CCG in the 1990-1992 Proceeding.

In short, PTV’s isolated position, that fees cannot even be considered as a criterion in awarding royalties, is legally and rationally unsupported. Under careful scrutiny, PTV’s argument opposing fee generation as a consideration comes down to nothing more than unsubstantiated possibilities. To quote PTV:

The value of a particular distant signal **could** greatly exceed the amount that a cable operator has to pay for it under the compulsory copyright regime. ... In addition, the relative value for one particular type of distant signal **could** be substantially higher than the relative value of another type of distant signal. ... A retransmitted distant PTV station’s value relative to its cost **could** be higher than another distant signal’s value relative to its cost. ...

PTV Facts ¶ 310 (emphasis added; citations omitted). Despite thousands of pages of record testimony and evidence in this Proceeding, and access to the record of royalty distribution proceedings spanning more than two decades, PTV cannot point to any evidence supporting these contentions.²⁵ PTV thus fails to prove the core argument in its case against using royalty data.

In sum, the CCG is not seeking to automatically apply a “time-plus fee generation” formula. Nor has the CCG asserted that the Panel must apply a royalty-based methodology to PTV. Rather, identification of the pool of money attributable to Canadian stations is only the starting point in allocating those royalties to the eligible copyright owners whose programs were shown on Canadian stations. The royalties can then be fairly allocated among those claimants eligible to receive compensation based on the relative value of that programming using the same types of valuation tools proffered by other parties. The

²⁵ JSC reaches the same conclusion, that there is no evidence supporting PTV’s contention. (JSC Facts ¶ 340.)

CCG's approach is the fairest method for distribution to the CCG, and the only method supported by the record evidence.

VI. PTV'S INAPPROPRIATE COMBINATION OF DISPARATE STUDY RESULTS IS FLAWED, PARTICULARLY WITH REGARD TO THE CCG

At Table 31, PTV purports to corroborate the proposed shares for each of the parties by combining and averaging the results from Fairley Adjusted Methods 1 and 3, Nielsen, and Rosston. (PTV Facts ¶ 662.) While PTV acknowledges that the Panel may give different weights to each of the studies (PTV Facts ¶ 663), PTV has nevertheless gone to the trouble of preparing the combined results for the CARP's perusal. This table should be ignored. As a threshold matter, PTV never offered any expert to opine that it is possible to combine and average results from disparate studies. Moreover, the record is clear that the accuracy, reliability and utility of the different studies differ dramatically. Simply averaging them together is meaningless and arbitrary.

The table is particularly misleading as to the CCG because it appears to corroborate an overall result for the CCG that comports with the PTV's remainder theory (*i.e.*, an award of 1.2%, which is more than the 1990-1992 award, but still far less than what the CCG is seeking, and less than the CCG awards that have been proposed by JSC, Program Suppliers or NAB). Specifically, Table 31 should be rejected because of its: (1) inclusion of the results of Fairley Method 1; (2) inclusion of the Rosston result for the CCG; and (3) failure to account for a Basic royalty fund adjustment for the CCG to reflect a limit on the amount of 3.75% Rate royalties that can be awarded to the CCG.

Even Fairley Method 3, which purports to give the CCG a reasonable royalty share, must be rejected. By giving automatic 100% valuations to systems carrying only Canadian or educational distant signals, this methodology is far more dependent on the number of such systems included in the Bortz Survey sample than on actual answers given by survey respondents. (*See* Written Rebuttal Testimony of William Fairley ("Fairley Reb.") at 47.) Adoption of the Method 3 adjustment for the CCG would anchor the CCG to a methodology that will result in wild and random swings in its royalty shares depending on how many systems carrying only Canadian distant signals end up in each year's survey

sample. For determining an award to the CCG, the CCG's own methodology remains superior to any offered by Dr. Fairley, PTV, or any other claimant.

A. Dr. Fairley's Method 1 Is Flawed As It Pertains to the CCG

The second column of Table 31 proffers an average of the Method 1 and Method 3 (unadjusted for Basic) for each of the claimants. For the Canadians, the Method 1 share of zero is combined with the Method 3 average of 3.01%.²⁶ It is improper to include Method 1 results in this table because Method 1 is fundamentally unreliable. As noted in the Proposed Findings of JSC, Dr. Fairley failed to realize that the survey respondents were asked the preliminary questions only for the distant signals actually carried. (JSC Facts ¶¶ 100-01.) Therefore, the zero result for the CCG is based on the responses of only 2 or 3 cable operators out of the 133-139 surveyed each year. (CCG Facts ¶ 103.) By including the Method 1 zero value, Dr. Fairley is imposing the Bortz study on the CCG despite the fact that the last CARP found the Bortz Survey "totally unreliable" with respect to the CCG and that JSC in this proceeding has acknowledged, at a minimum, that the 1998-1999 Bortz study's sample of systems carrying Canadian distant signals is too small to provide meaningful results as to the CCG royalty allocation. (CCG Facts ¶¶ 97-105; JSC Facts ¶ 118.) Dr. Fairley himself dismissed the results stating that, though he reported calculations for the CCG, the sample was too small for the results to be conclusive. (Fairley Reb. at 2 n.2)

Moreover, Method 1 should be ignored in its entirety because, as Dr. Fairley further acknowledged, only 15% of all respondents responded to all the preliminary questions. According to Dr. Ringold, 50% is the minimum response rate at which there can be any confidence in survey results. (Ringold Tr. at 6658.) Indeed, the confidence intervals for the responses used in Method 1 are so wide as to make the results unusable. (See JSC Facts ¶ 102.)

²⁶ PTV only reports adjusted Basic fund shares in its Proposed Findings (See PTV Facts ¶ 662 and n. 55; Fairley Reb. at 49 (Table 13).)

B. The Rosston Results Are Flawed As They Pertain to the CCG

In Table 31, PTV further reduces the Canadians' prospective share by combining the Rosston results for the Canadians with the Fairley adjustments. The Rosston results should not have been included. As explained in the testimony of Dr. Calfee and as acknowledged by NAB in its proposed findings, the Rosston study does not produce reliable or useable results for the CCG and therefore must be ignored. (*See* section III.B, *supra*; CCG Facts ¶ 112; NAB Facts ¶ 239.)

C. If PTV Receives a 3.75% Rate Fund Adjustment, Then the CCG Must Receive a Similar Adjustment

In Table 31, PTV adjusts the Basic Fund shares to reflect its position that PTV must receive an increased Basic Fund award because PTV is not eligible to receive a 3.75% Rate royalty award. As set forth in section VII, *infra*, the CCG strenuously opposes such an adjustment for PTV. Yet, if such an adjustment is made for PTV and if, over CCG objection, the Panel awards the CCG a Bortz-based royalty share, the same type of adjustment must be made for the CCG's share. While the CCG is eligible to receive 3.75% Rate royalties, the CCG 3.75% Rate award is limited by the amount of 3.75% Rate royalties actually generated by Canadian signals. 1990-1992 Proceeding, 61 Fed. Reg. at 55663.

In this proceeding, the Canadians have submitted evidence that demonstrates that the Canadian signals generated 0.25% and 0.63% of the 3.75% Rate royalties in 1998 and 1999. By comparison, the PTV Method 3 leads to the conclusion that the CCG would be entitled to a combined 3.75% Rate award of at least 3.27% under Method 3. (PTV Facts at pp. 44-45 n. 20.) Because the CCG is not eligible for such a large share of the 3.75% Rate royalties, the Canadian Basic award as reflected in Fairley Method 3 would have to be adjusted upward to reflect the proper ratio of 3.75% Rate royalties that may be awarded to the CCG. Under Dr. Fairley's Method 3 adjustment, the CCG would be entitled to 3.01% of all funds. (Fairley Reb. at 49 (Table 13).) Accordingly, the CCG shares of the Basic

Fund, based on Fairley's Method 3 and adjusted to reflect a share of total royalties are 3.32% for 1998 and 3.27% for 1999.²⁷

**VII. THE CCG BASIC ROYALTY AWARD SHOULD NOT BE ADJUSTED
DOWNWARD TO ACCOMMODATE PTV'S IMPROPER ADJUSTMENTS
TO THE BASIC ROYALTY SHARES**

PTV argues that it is entitled to an adjustment of its Basic royalty award to account for its ineligibility to participate in the 3.75% Rate fund. (PTV Facts at pp. 124-25.) PTV suggests that "the logic of the [adjustment] is unimpeachable." (PTV Facts ¶ 602.) That is hardly the case. To make the adjustment requires increasing PTV's share of the Basic Fund at the expense of all other claimants. There is no justification for decreasing other claimants' shares because PTV is ineligible to participate in certain funds. Certainly, an adjustment for PTV should not impact the shares of the CCG because no PTV programming was carried on Canadian distant signals.

More to the point, this adjustment has been rejected each time it has been raised. First, by the last CRT in the 1989 proceeding and then by the 1990-1992 CARP. PTV now argues that the issue is different this time and the reasoning of the prior two rulings does not apply. (PTV Facts ¶¶ 603-04.) This echoes the argument made in the 1990-1992 Proceeding, which was noted by the Librarian:

Although PBS made a similar adjustment argument to the Tribunal in the 1989 proceeding, which was expressly rejected by the Tribunal, PBS argues that it presented new evidence and argument for adjustment in this proceeding, thereby precluding the Panel from properly relying upon the Tribunal's rejection rationale. 1990-1992 Proceeding, 61 Fed. Reg. at 55667.

²⁷ Adjusting the Method 3 share of the Basic fund is slightly more complicated for the CCG than it is for PTV because the CCG is eligible for some small share of the 3.75% Rate fund in 1998 and 1999. Based on Dr. Fairley's 0.9 "Basic Fund Adjustment Factor" for PTV (PTV Facts ¶ 662 n.55) and the 3.01% award, the adjustment factors for the CCG Method 3 Basic Fund award are 0.907538 for 1998 and 0.919240 for 1999. The formula for deriving these adjustment factors is: (Method 3 Percentage * 0.9) / (Method 3 Percentage - (CCG's actual 3.75% Rate fee gen percentage * 0.1)).

Regardless of PTV's latest spin on the meaning of the Bortz question and its applicability to the royalty funds, in the end PTV is not eligible to participate in the 3.75% Rate fund, directly or indirectly. An increase in PTV's share of the Basic Fund to account for that fact will circumvent this prohibition and actually give PTV a share of the 3.75% Rate fund. Calling it an increase in the Basic royalty award simply changes its name; it does not change its true nature.

PTV's adjustment may also unfairly harm other claimants, including the CCG. If the Panel accepts this proposed adjustment, it should not reduce the CCG's award (as proposed by NAB and PTV) because the CCG award is based on the fees actually paid for its programming, which are not affected by whether or not PTV is eligible to participate in any particular stream of royalties.

VIII. THE CCG'S SHARE OF MUSIC'S AWARD SHOULD BE PROPORTIONATE TO THE CCG'S SHARE OF EACH ROYALTY POOL

JSC argues that Music Claimants should receive a total of 2% of the Basic and 3.75% Rate royalties and that the shares of each Phase I group should be adjusted individually to account for the value of music to that claimant group's programming. (JSC Facts at p. 3.) Using this "different use" approach, JSC contends that for 1998 and 1999, 11.9% and 12.5% of the Music Claimants' award (or roughly 0.2% of the 2% Music award) should come from JSC. (*Id.*) Thus, under this approach, JSC would not contribute 36.6% and 38.3% of the Music Claimants' awards for 1998 and 1999 (assuming the CARP were to give JSC its requested award). The remaining 1.8% of Music's award would presumably come from the other non-settling parties.²⁸

While the CCG does not agree or disagree with the different use approach, two points must be brought to the CARP's attention. First, this approach seems administratively burdensome given that Music's very small share would need to be allocated meticulously among the other claimants.

²⁸ NAB makes the same argument, concluding that it should contribute only "0.175 percentage points for every 1.0 percent point allocated to other programming." (NAB Facts ¶ 202.)

Second, the different use approach requires that some parties must bear a larger share of the Music Claimants' award if those parties use a larger share of music in their programming. That rationale does not apply to the CCG. As has been demonstrated, the CCG claim includes all of the types of programming claimed by the parties: sports, movies and series, news and public affairs programming, and arts and children's programming. (CCG Facts ¶ 20.) There is no evidence that the mix of CCG programming differs materially from the total mix of programming claimed by all other parties. Therefore, the CCG believes that it should contribute an amount exactly proportionate to the overall award to the Music Claimants. Thus, for example, if the Panel awarded Music Claimants 2.0% and the CCG 2.5% of the Basic royalties for 1998, the CCG would contribute 2.0% of its award towards Music's award or 0.05% of the entire Basic royalty pool. Stated a different way, the CCG award would be reduced to account for Music's 2.0%, from 2.5% to 2.45%.

IX. CONCLUSION

During 1998 and 1999, approximately 3.3% and 3.6%, respectively, of all distant Basic cable royalties, and 0.25% and 0.63%, respectively, of all 3.75% Rate royalties were paid for the carriage of Canadian stations to compensate the "creators of the works retransmitted" on those stations. Only parties whose works were retransmitted on the stations are eligible to receive the royalties paid for those stations.

Applying the basic principles behind the Copyright Act's compulsory licensing scheme and the concept of changed circumstances, CCG members are entitled to no less than 70% of these royalties. Remaining royalties should be specifically awarded to the Joint Sports Claimants and to Program Suppliers in the manner set forth in Appendices B through E of the CCG's Proposed Findings of Fact and Conclusions of Law.

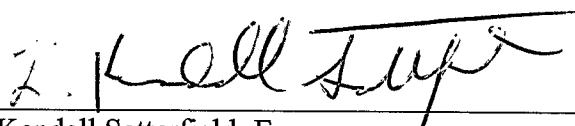
The CCG therefore requests an award of 2.25073% of the 1998 and 2.47694% of the 1999 Basic Cable royalty funds, and 0.17301% of the 1998 and 0.42946% of the 1999 3.75% Rate royalty funds.²⁹

²⁹ The requested percentages already account for an award to the Music Claimants of 2.33% and the settlements with NPR and the Devotional Claimants. CCG does not seek a share of the Syndex royalties.

The CCG asks the Panel to consider its claim carefully and provide its members with an award that reflects the value of Canadian programming to those cable operators who paid for such programming.

Respectfully submitted,

Dated: September 5, 2003



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Before the
COPYRIGHT ROYALTY ARBITRATION PANEL
LIBRARY OF CONGRESS
Washington, D.C.

In the matter of

1990, 1991 and 1992
Cable Royalty
Distribution Proceedings

Docket No. 94-3 CARP CD90-92

**Proposed Findings of Fact and Conclusions of Law
of the
Canadian Claimants**

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the percentages of content on Canadian signals attributable to Program Suppliers and the Joint Sports Claimants. (Bennett Tr. at 7477-7478.)

52. Exhibit CDN 6-B demonstrates that the Canadian stations with predominately Canadian content are responsible for the lion's share of subscribers and fees generated by Canadian signals. Indeed, for 1991 the stations carrying the highest percentages of Canadian content are responsible for generating over 80% of the total fees and attracting almost 80% of the subscribers. For 1992, the stations carrying the highest percentages of Canadian content are responsible for generating over 82% of the total fees and attracting almost 80% of the subscribers (Bennett Direct at 2; Exhibit CDN 6-B.)

53. Exhibit CDN 6-B also shows that Canadian signals are more attractive to cable operators and subscribers when they have predominately Canadian programming. This evidence refutes the Tribunal's past presumption that Canadian signals are carried "primarily" for their hockey games. The Canadian Claimants should not be penalized as they have in the past for anecdotal claims that their signals are carried primarily because of hockey games. The actual value of Canadian content is far higher than the Copyright Royalty Tribunal previously recognized. (Bennet Direct at. 2.)

54. By multiplying the percent of Canadian content on each Canadian signal times the total royalties generated by that signal, and then dividing that amount by the total royalties for all Canadian signals it is possible to obtain a fee weighted measure of Canadian content on Canadian distant signals. (Bennett Tr. at 7482-7484.)

55. The fee weighted percentage of Canadian content on the Canadian distant signal is 71.15% for 1991 and 70.43% for 1992. The combined two year fee weighted measure of Canadian content on Canadian distant signals is 70.79%. (Exhibit CDN 6-B.)

197. The individual and combined average results for the Canadian programming in the eight studies are shown below (Exhibit CDN 7 (Ford & Ringold) at Tables 1a & 7a):

| Ford/Ringold Value of Canadian Programming on Canadian Distant Signals | | | |
|---|------------------------|-------------------------|--------------------------------------|
| | French-Language | English-Language | French & English Combined |
| 1991 | 50.13% | 46.30% | 47.73% |
| 1992 | 56.71% | 53.61% | 54.78% |
| 1993 | 63.94% | 57.71% | 60.00% |
| 1994 | 59.72% | 61.31% | 60.70% |
| Four Year Combined | 57.91% | 55.00% | 56.09% |

198. The individual and combined average results for the sports programming (including both compensable programming and non-compensable network games) in the eight studies are shown below (Exhibit CDN 7 (Ford & Ringold) at Tables 1a & 7a):

| Ford/Ringold Value of Joint Sports Programming on Canadian Distant Signals | | | |
|---|------------------------|-------------------------|--------------------------------------|
| | French-Language | English-Language | French & English Combined |
| 1991 | 29.06% | 39.81% | 35.81% |
| 1992 | 28.43% | 25.00% | 26.30% |
| 1993 | 21.06% | 34.03% | 29.27% |
| 1994 | 20.94% | 27.24% | 24.83% |
| Four Year Combined | 24.53% | 31.77% | 29.06% |



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In the Matter of)
)
1983 Cable Royalty Fund)
Distribution Proceeding)

Docket No. CRT 84-1 83CD

ORDER

On May 29, 1985, the Program Suppliers filed their objections to the direct case evidence of the other claimant groups. One objection was to the testimony for the Devotional Claimants of Dr. David W. Clark, pp. 21-26 and to exhibits 12 and 13. The Program Suppliers objected that this testimony puts forward the time plus fee generated formula as the most reliable and most equitable means for the Tribunal to employ in making its allocation when such a formula had been rejected by the Tribunal in its final determination of the 1978 Cable Distribution Proceeding. The Devotional Claimants responded to the objection by arguing that the objection was untimely made and that it was not an evidentiary objection but rather a substantive argument about the proper standard for allocation.

On June 5, 1985, the Program Suppliers filed a Motion for Summary Dismissal on the Issue of a Time Plus Fee Generated Formula For Allocating Royalties. In their motion, the Program Suppliers stated that they were seeking summary disposition of a single limited issue: the use of a time plus fee generated methodology for allocating royalties.

In our Order of June 14, 1985, the Tribunal reserved ruling on the Program Suppliers' evidentiary objection until after it had considered later-filed pleadings on the issue. On June 19, 1985 at hearing, the Tribunal ordered all interested parties to file their comments concerning the Program Suppliers' motion by June 28, 1985. We received an opposition to the motion from the Devotional Claimants, comments from the Joint Sports Claimants, PBS, and the Canadian Claimants, and a reply to the Devotional Claimants' opposition from the Program Suppliers.

Argument

The Program Suppliers argue that use of a time plus fee generated methodology for distributing shares of royalties has been decisively and consistently rejected by the Tribunal; no new policy grounds have been offered by Dr. Clark to justify reconsidering established policy; and that the issue can and should be resolved at this time. They state that they do not seek to dismiss the component facts of either time or fee generation such as are contained in Devotional Exhibit 9 which ranks stations by the total fees generated, and the amounts of time for devotional programming. They seek to dismiss the formula as the means for allocation.

The Devotional Claimants reiterate their contention that the objection to Dr. Clark's testimony was not made during the period

provided by the Tribunal's Order published in the Federal Register of April 8, 1985 for informal resolution of evidentiary objections, and is therefore untimely. The Devotional Claimants further argue that the Program Suppliers have offered their own formula based upon fee generation, and that they cannot be allowed to close the door on the Tribunal's consideration of another, alternative approach for the allocation of royalties. The Devotional Claimants point out that at one time the Program Suppliers believed that time plus fee generation was "necessary to provide equity, fairness and consistency with the provisions of the Copyright Act."

The Joint Sports Claimants agree that the Tribunal has rejected the time plus fee generated formula as a basis for making royalty allocations and the rejection was entirely proper because it is in their view inconsistent with the intent underlying the Copyright Act. Therefore, the Joint Sports Claimants believe that it would be wasteful to devote hearing time to an already discredited formula. However, the Joint Sports Claimants note that the Tribunal may consider evidence related to time or to fee generation, because time has been traditionally accorded a secondary consideration, and fee generation, according to the Joint Sports Claimants, is directly related to marketplace value. The Joint Sports Claimants also note that other parties have reraised issues which the Tribunal has rejected in past proceedings; that they cannot see a distinction between other issues which have been reraised and this one; and

therefore, they interpose no objection to the Devotional Claimants presenting testimony on a time plus fee generated formula for whatever value the Tribunal may want to give it.

PBS agrees with the Program Suppliers that the time plus fee generated formula has been rejected in the past, and should not be the basis for allocating the 1983 fund, but opposes the exclusion of the formula at this juncture of the proceeding. PBS believes that this matter would be better resolved after hearing testimony and receiving post-hearing briefings by the parties.

The Canadian Claimants disagree that the Tribunal has rejected the time plus fee generated formula. They argue that the Tribunal has rejected it only as the sole criteria for allocating the royalty fund, and that the Tribunal left available its consideration of the formula as one of a variety of considerations and factors it may look to in allocating the fund. The Canadian Claimants believe that the Tribunal should take into account all pertinent data and considerations presented by the claimants.

The Program Suppliers reply that they do not object to fee generation analyses in general. Their sole objection is to one method of allocation - time plus fee generation. The Program Suppliers believe that neither the Tribunal nor the parties should be required to retil the same ground to find that the time plus fee generated method is barren of any substance for purposes of royalty distribution.

Discussion

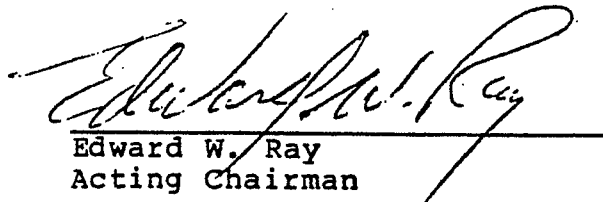
The Tribunal has overruled a number of evidentiary objections because they were untimely made. See, Order, dated June 14, 1985. However, in the interest of taking up the issues which shape this proceeding, we will address the objection lodged by the Program Suppliers.

We find that our view of the 1978 Cable Final Determination comes closest to the position advanced by the Canadian Claimants in their comments. In the 1978 proceeding we stated, "What is clear to us from this turmoil is that no single formula advocated by any party succeeds in taking account of all pertinent data and consideration . . . The Tribunal has made an allocation on the basis of the entire record of this proceeding. Our allocation has been fashioned by taking account of a variety of considerations and factors, as well as the use of combined results of a number of the approaches urged by the parties, adjusted as appropriate." 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63035 (1980). Specifically, in regard to the Program Suppliers' proposed time plus fee generated formula, we stated, "We find serious weakness in the MPAA formulation. Both studies used factors for estimating the amount of non-network programming carried by network affiliate stations. The validity of these estimates was not sufficiently established in the opinion of the Tribunal. We thus rejected the MPAA

formulation as a complete (emphasis added) solution to the allocation problem." Id., at 63037. In a previous passage, we stated, "The time-related consideration factor, in comparison to all other factors used in arriving at the final allocation for each category of claimants was given very limited weight by the Tribunal. We find that despite the clear deficiencies and questionable data in all the time-related methods, each did offer some probative value to which we were able to accord some limited weight. The number of hours of cable carriage of particular kinds of qualifying programming was of some value to us. We found however that there were serious problems inherent in the use of any formulation which would allocate the royalty fees exclusively on the basis of hours of carriage in that such formulation fails to compensate copyright owners adequately for the use of their programming. We conclude that an allocation of royalties mainly based on the amount of time occupied by particular categories of programming would ignore market considerations and produce a distorted value of programming." Id., at 63036, 63037.

Taking these statements together, the Tribunal stated in 1980 that it based its decision on the entire record, that it found weaknesses in the time plus fee generated method and could not make it the basis of a complete solution, that it could accord some limited weight to time-related methods, but it heavily criticized any formulation which allocates exclusively

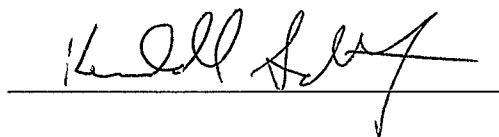
on the basis of time. We hold to our statement that no single formula advanced by the parties in the 1978 proceeding was adequate. Therefore, to the extent that the Program Suppliers seek summary dismissal of the time plus fee generated method as the sole basis for making allocations of royalties, we grant their motion. To the extent to which the Program Suppliers seek summary dismissal of the time plus fee generated method as one factor among others for making allocation of royalties, the motion is denied. Similarly, the evidentiary objection raised by the Program Suppliers is denied. The testimony will be accepted into the record as one factor among others to be considered by the Tribunal


Edward W. Ray
Acting Chairman

Dated: August 7, 1985

CERTIFICATE OF SERVICE

I, Kendall Satterfield, hereby certify as of September 5, 2003, that a true and correct copy of the foregoing documents were sent by hand-delivery or Federal Express to the persons on the service list below:



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GENERAL COUNSEL
OF COPYRIGHT

September 5, 2003

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Re: Distribution of 1998-1999 Cable Royalty Funds
Docket No. 2001-8 CARP CD 98-99

Dear Ms. Grimes:

Enclosed please find an original and 4 copies of the Canadian Claimant Group's Reply Findings of Fact and Conclusion of Law. Also please find a CD containing a Word 97 version of the Reply Findings.

Please do not hesitate to call if you have any questions about this document.

Sincerely,



L. Kendall Satterfield

Enclosures